KIAN GWAN ENGINEERING PTE. LTD.

v.

SATO KOGYO CO. LTD.

HIGH COURT, SINGAPORE
LP THEAN J
[SUIT NO. 1847 OF 1988 (SUMMONS-IN-CHAMBERS NOS. 4920 OF 1989 & 779 OF 1990)]
1 AUGUST 1991

CONTRACT: *Main contract and sub-contract - Non-payment of progress payments in main contract resulted in default in payments under sub-contract - Whether delay by sub-contractor - Counterclaim - Liquidated damages.*

CIVIL PROCEDURE: *Application for final judgments - Defence of issue estoppel - Principles - Reasonable diligence.*

The employer P entered into a contract with the defendants, a Japanese company for the construction of a multi-storey building. The defendants then entered into a sub-contract with the plaintiffs for the air-conditioning and ventilation works for the building.

Due to the employer's financial difficulty it did not pay the defendants sums due under certain architect's certificates. As a result, the defendants did not pay the plaintiffs these amounts. Notwithstanding, the plaintiffs continued with the work then outstanding. A sum of over $1.3 million remained unpaid by the defendants, being the total amounts certified by the architects under 8 certificates issued to the defendants.

On 4 September 1987, the plaintiffs issued a letter of demand to the defendants for payment of this sum. On 23 September 1987, the defendant sued the employer for $7.7 million. On 14 March 1988 the employer consented to judgment for this amount, which included, *inter alia*, the balance sum due to the plaintiffs.

As no payment was made to them, the plaintiffs instituted the present action against the defendant for $1.32 million. The defendants entered a conditional appearance and applied to stay the proceedings under s. 7 of the Arbitration Act by virtue of an arbitration clause in their agreement with the plaintiffs. The defendants maintained that there was a dispute between the parties as it had a cross-claim against the plaintiffs for liquidated damages under the main contract for delay in completing the building, which was alleged to be caused by the plaintiffs.

The Assistant Registrar allowed the defendant's application. The plaintiffs appealed and this appeal (the first appeal) was allowed by the Court. In its grounds of judgment the Court found that there was no dispute between the defendants and the plaintiffs.

Following this decision, the plaintiffs applied by way of summons-in-chambers for final judgment. The defendants then took out a summons-in-chambers, asking for an order that the issue of whether the defendants were precluded by the doctrine of *res judicata* or estoppel by record, from resisting the plaintiffs' application, be determined before the hearing of that application. Both the summons-in-chambers were disposed of in favour of defendants; the plaintiffs appealed against both orders.

The first issue was whether the doctrine of issue estoppel applied and if not, whether the defendants have raised a triable issue in their defence to the plaintiffs' claim.

Held:

[1] The doctrine of issue estoppel applies in this case as the defendants' cross-claim against the plaintiffs had already been raised, and disposed of, in the first appeal.

[2] Nothing had been produced by the defendants to show that they were liable to pay liquidated damages in any amount to the employer and did pay liquidated damages to the employer.

[3] Even assuming that issue estoppel did not arise, there was no notice given to the plaintiffs that a part of the liquidated damages which the defendants had paid to the employee would be passed on to the plaintiffs. There was no contemporaneous document to the effect that the defendants held the plaintiffs responsible for any part of the delay. On the evidence before the Court, no payment of any liquidated damages has been paid by the defendants to the plaintiffs.

[4] Having failed to prove indemnity for liquidated damages payable to the employer, the defendants sought to recover in its cross-claim for "losses" as being additional preliminaries. The Court finds no basis for it. Furthermore, the defendants had never given any notice of such loss or damage to the plaintiffs, as required under cl. 40(a) of the sub-contract.

[First appeal, judgment for the plaintiffs with costs. Second appeal, order of the Assistant Registrar set aside.]

Cases referred to:
Fidelitas Shipping Co. Ltd. v. V/O Expotrchleb [1966] 1 QB 630 ***(foll)***
Mills v. Cooper [1967] 2 QB 459 ***(foll)***

Legislation referred to:
Arbitration Act [Sing], s. 7

For the plaintiffs - Harry Elias with Herbert Wilson
For the defendants - Jimmy Yap

JUDGMENT

LP Thean J:

There were two appeals before me: the first was an appeal against the decision of the Assistant Registrar on summons-in-chambers no. 4920 of 1989 in which he granted to the defendants unconditional leave to defend the claim of the plaintiffs, and the second was an appeal against the decision of the same Assistant Registrar on summons-in-chambers no. 779 of 1990 in which he held that the defendants were not estopped from raising the issue of counterclaim to resist the plaintiffs' claim. Both the appeals were heard together. At the conclusion of the hearing I allowed the first appeal, set aside the order of the learned Assistant Registrar and gave judgment to the plaintiffs in the sum of $1,325,435.55 with interest and costs. As for the second appeal, I set aside the order of the learned Assistant Registrar, and since the issue raised in that appeal had been disposed of in the first appeal I made no order on the application, namely, summons-in-chambers no. 779 of 1990. I now give my reasons.

The plaintiffs are a company incorporated in Singapore and are contractors specialised in air-conditioning and ventilation works. The defendants are a construction company incorporated in Japan and were the main contractor in the construction of a 27 storey shopping and apartment complex known as "Riverwalk Galleria" at South Bridge Road, Singapore. The complex consists of a podium block with six floors of shops and a tower block with twenty

floors of residential apartments. The main contract for the construction of the entire building (that is, the podium block and tower block) was made between Premier Realty Pte. Ltd. (the employer) and the defendants on or about 3 March 1983 (the main contract). The sub-contract for the air-conditioning and ventilation works for the entire building was made between the defendants as the main contractor and the plaintiffs as the nominated sub-contractor on 14 April 1983 (the sub-contract). The air-conditioning and ventilation works involved the supply and installation of a central air-conditioning unit or plant for the podium block and individual "Sanyo" split units for the 118 apartments in the tower block. The architects in charge of the building project were RSP Architects Planners & Engineers (the architects), and Squire Mech Pte. Ltd. were the mechanical and electrical consulting engineers (the engineers).

Pursuant to the sub-contract, progress payments were made to the plaintiffs by the defendants upon issue of the architects' certificates to the defendants under the main contract which included the amounts due for works carried out by all nominated subcontractors, including the plaintiffs. The last payment received by the plaintiffs from the defendants was that made upon the issue of the architects' certificate no. 37 dated 26 November 1985. Subsequent architects' certificates of payments no. 38 to 43 were issued to the defendants on diverse dates between 17 December 1985 and 30 May 1986; however, none of the amounts due under the certificates were paid by the employer to the defendants; the employer was strapped for cash. The defendants as the main contractor in turn did not make any payment to any of the nominated subcontractors of any part of the amounts included in any of the certificates. On 9 September 1986, the architects wrote the following letter to the employer:

> Dear Sirs,
>
> **Riverwalk Galleria at 20 Upper Circular Road Outstanding Payments in the Architect's Certificates Nos. 38 to 42**
>
> We wish to draw your kind attention to M/s. Sato Kogyo's letter ref: RWG-860506A dated 6 May 1986 and the various NSC's letters (e.g. M/s. Kian Gwan's letter ref: A/LOC/86/1525/466 dated 14 Aug 86) referring to the following Architect's Payment Certificates issued by us which have not been honoured, *viz*:
>
> | Architect's Certificate Nos. | Date Issued |
> |---|---|
> | 38 | 17 Dec 1985 |
> | 39 | 31 Jan 1986 |
> | 40 | 21 Feb 1986 |
> | 41 | 3 Apr 1986 |
> | 42 | 21 Apr 1986 |
> | 43 | 30 May 1986 |
>
> We would advise that without prejudice, you have to comply to cl. 30 on certificates and payments in the superstructure contract.
>
> Your urgent attention to the above matter is appreciated.
>
> Yours faithfully
>
> - sgd -
>
> Rsp Architects Planners & Engineers

Notwithstanding that no payment was made, the plaintiffs proceeded with and completed the works then outstanding. The total amount for the works carried out and equipment and material supplied by the plaintiffs under the sub-contract and included in all the certificates issued by the architects to the defendants under the main contract was $3,970,810.35. The engineers on 5 June 1987 certified that the amount was due on account of works carried out by the plaintiffs under the terms of the sub-contract, and the architects also accepted this amount in the valuation prepared by the quantity surveyors, W.T. Partnership: see their letter of 17 June 1987 to the defendants (to which I shall revert in a moment). Of the total amount of $3,970,810.35, a sum of $2,645,374.80 had been paid to the plaintiffs by the defendants leaving only the balance sum of $1,325,435.55 unpaid. This balance sum is the total of the amounts included in the architect's certificate nos. 38 to 45 issued to the defendants.

Under the main contract, Phase I of the development was to be completed by March 1984 and Phase II thereof by September 1984. However, practical completion of Phases I and II was only achieved on 30 March 1986 and 30 August 1985 respectively. On 10 November 1986 the architects despatched the following telex to the defendants:

> **Re: Riverwalk Galleria - extn of time for completion of project**
>
> We refer to the above
>
> We R to inform U that hvg duly considered the claims submitted by U fwg the exhaustic exercise of searching thru' the records to verify the facts. The consultant team is of the fwg unanimous view:
>
> (a) That for a Phase I of the Superstructure contract (that is, completion of the podium blk) an extn of 632 days shall B given to U to complete this work.
>
> (b) That for Phase II of the superstructure contract (that is, completion of the tower blk) an extn of 233 days shall B given to U to complete this work.
>
> The revised dates for completion of Phase I N II works R therefore 20 December 85 N 20 May 85 respectively.
>
> Since the practical completion dates HV also been established as 30 March 1986 and 30 August 1985 for Phase I N II respectively, PLS note that liquidated N ascertained damages as per cl. 22 of the conditions of contract shall B payable by U to the employer.

No copy of this telex was given to the plaintiffs, and it was produced for the first time after the commencement of this action and was relied upon by the defendants as establishing that the employer was entitled to claim against them a sum of $3,020,000 as liquidated damages. However, there was no claim or demand expressly made by the employer for payment of liquidated damages following the architects' telex. The employer on 24 November 1986 offered to the defendants "properties in Riverwalk Galleria" in settlement of the final contract sum and if this offer was accepted, no liquidated damages would be claimed. This offer was contained in the letter dated 24 November 1986 written by the employer to the defendants, which was as follows:

> Sato Kogyo Co. Ltd.
>
> 149 Rochor Road #04-14/15
>
> Fu Lu Shou Complex
>
> Singapore 0718
>
> **Attention Mr. M Harada**

Dear Sirs

Riverwalk Galleria - Final Account

We confirm that the Final Contract Sum as determined by M/s. WT Partnership is S$38,75l,076.33. For reasons of expeditiousness, we have agreed to this figure provided you agree to accept properties in Riverwalk Galleria and/or Apartments in exchange for the outstanding amount owing to you (excluding nominated subcontractors' amounts).

We also confirm that if you should agree to the exchange of properties, no liquidated damages will be sought from you. If, however, you are not agreeable to the exchange, we reserve our right to impose liquidated damages as determined by the consultants.

Yours faithfully

Premier Realty Pte. Ltd.

- sgd -

Cheah Sin Hean

Project Manager

The offer was accepted by the defendants and subsequently a final account was drawn up by W.T. Partnership stating that the final contract sum was $38,799,687.76 with details showing how this sum was arrived at. This statement of final account was signed by both parties on 25 February 1987 and contained, *inter alia*, the following:

We, the undersigned, confirm our mutual acceptance of the sum of $38,799,687.76 as the Final Contract Sum for the above project. We also confirm that the said sum takes into account all existing or contingent liabilities and that we have no further claims against each other whatsoever for or in respect of or arising from the said project including but not limited to the following:

(1) Additional preliminaries, loss and expense caused by disturbance of regular progress of the works.

(2) Liquidated damages or otherwise arising from any delay of the said project arising from the default of the contractor.

The "Final Contract Sum" was the total amount of all the sums certified by the architects as payable to the defendants under the main contract, and included, among others, a sum of $12,443.689.12 for "nominated subcontractors' final account" and this latter sum in turn included, among others, the plaintiffs' total sum of $3,970,810.35. The architects then on 17 June 1987, in issuing the final certificate no. 45, wrote to the defendants, which, so far as relevant, was as follows:

Sato Kogyo Co. Ltd.

149 Rochor Road #04-14/15

Fu Lou Shou Complex

Singapore 0718 D

Dear Sirs,

Riverwalk Galleria - Superstructure

Contract - Certificate No. 45 (Final)

We enclose herewith our Certificate No. 45 in the sum of Singapore Dollars: Eight hundred seventy eight thousand and seventeen and cents twenty six only (S$878,017.26) in your favour as final payment for works executed to the above-mentioned project as per M/s. W.T Partnership's Valuation No. 45 dated 11 June 1987.

Please note that in this valuation, we have included the total gross amount due to the following nominated sub-contractors and suppliers:

1. Kian Gwan Engineering $3,970,810.35

Please note that this shall be the last and final certification and no further claim whatsoever shall be entertained under this contract.

Kindly forward the certificate to our client for payment in due course.

Yours faithfully,

- sgd -

RSP Architects Planners & Engineers

The proposal by the employer that payment of the outstanding contract sum in the form of a transfer of properties was accepted not only by the defendants but also by the plaintiffs in respect of the balance sum. The parties, in fact, had settled the terms of the agreement between the employer, the defendants and the plaintiffs, and that agreement was executed by both the defendants and the plaintiffs; it was not, however, executed by the employer owing to certain difficulties it had with its banks and other financial institutions. Accordingly, the agreement became abortive.

On 4 September 1987 the plaintiffs issued a letter of demand to the defendants for payment of the balance of the amount unpaid, that is, $1,325,435.55. No response was forthcoming from the defendants.

However, on 23 September 1987 the defendants themselves instituted proceedings in suit 2548 of 1987 in the High Court against the employer claiming the sum of $7,786,290.59, being the total of the amounts certified by the architects in certificates no. 38 to 45. Subsequently, the defendants applied for summary judgment against the employer. No defence of set-off or counterclaim for liquidated damages was raised by the employer. The defence raised by one Cheah Sin Hean, a director of the employer, was that the defendants had accepted properties offered by the employer in settlement of the sum due and thereby the main contract had been discharged and substituted by the new agreement made between the employer and the defendants. In rebuttal, the defendants maintained that the agreement to accept properties from the employer had lapsed and the main contract had not been discharged. The dispute between the defendants and the employer was finally resolved by the employer consenting to judgment in the full amount as claimed by the defendants being entered against it on 14 March 1988; that amount included, among others, the balance sum due to the plaintiffs and included in certificates issued by the architects.

In the meantime, as no payment was received, the plaintiffs instituted this action against the defendants claiming the balance sum of $1,325,435.55. After the writ was served, the defendants through their solicitors immediately entered a conditional appearance and took out an application for a stay of all further proceedings under s. 7 of the Arbitration Act. The ground of the application was that there was a dispute in relation to the claim of the plaintiffs in that the defendants had a cross-claim against the plaintiffs, which arose in this way. The employer had a claim against the defendants for liquidated damages under the main contract for delay in completing the building, and the defendants alleged that the delay was

substantially caused by or attributable to the plaintiffs. The defendants under the sub-contract were entitled to claim against the plaintiffs for an indemnity and to set off against any money due from the defendants to the plaintiffs any sum which the plaintiffs were liable to pay to the defendants under the sub-contract. By reason of this cross-claim, the defendants maintained that there was a dispute between them and the plaintiffs, which ought to be referred to arbitration as provided under the sub-contract. The Assistant Registrar who heard the application allowed it. Against that decision, the plaintiffs appealed and the appeal was heard before me. I allowed the appeal with costs, set aside the order of the learned Assistant Registrar and dismissed the defendants' application with costs. I shall refer to this appeal as "the first appeal". In my grounds of judgment dated 28 August 1989, I said, at pp. 11-12:

> In my judgment, on the material before me, there was no dispute in relation to the claim of the plaintiffs in this action. The amount of $1,325,435.55 was and is indisputably due, and the cross-claim for an indemnity and set-off raised by the defendants based on the alleged claim for liquidated damages by the employer was a sheer subterfuge or device to delay payment to the plaintiffs. The cross-claim of the defendants was purely their own invention and was manifestly not *bona fide*. I therefore could come to no other decision than this: that there was no dispute warranting an arbitration and accordingly the application for a stay should not have been allowed.

Against my decision on the first appeal no appeal has been brought by the defendants.

Following the disposal of the first appeal in their favour, the plaintiffs took out the summons-in-chambers no. 4920 of 1989 applying for final judgment against the defendants. Soon thereafter, the defendants took out and, in my view, quite unnecessarily, summons-in-chambers no. 779 of 1990 seeking an order that the issue whether the defendants were precluded "by the doctrine of *res judicata* and/or doctrine of estoppel by record from resisting" the application for summary judgment be determined before the hearing of that application. Both the summons-in-chambers were heard and disposed of by the learned Assistant Registrar in favour of the defendants, and on appeal I allowed both the appeals and made the necessary orders.

At hearing of the two appeals, two issues were raised. The first was whether in view of what I had decided in the first appeal the defendants were estopped from raising the defences which they now raised in resisting the application for summary judgment. To determine this issue, it is necessary to examine in some detail the matters raised or allegations made by or on behalf of the parties in connection with the application for summary judgment. Numerous affidavits were filed on behalf of both the plaintiffs and the defendants respectively in support of and in opposition to the application. In addition, the parties also relied upon the earlier affidavits filed respectively in respect of the application for a stay of proceedings, which was the subject of the first appeal.

In his affidavit affirmed on 11 October 1989, Lau See Kiat, the contract manager of the defendants, deposed to the following. He said that the defendants had a cross-claim against the plaintiffs and were therefore entitled to set off against the whole or part of the plaintiffs' claim the amount of the cross-claim, and the cross-claim arose from the plaintiffs' breach of their obligations under the sub-contract, and the breach occurred in this way. The completion dates of the entire development under the main contract were revised to 20 December 1985 for Phase I and 20 May 1985 for Phase II, but practical completion was achieved only on 30 March 1986 for Phase I and 30 August 1985 for Phase II. On this point the defendants relied on the telex of 10 November 1986 from the architects to the defendants, to which I have adverted in detail. Therefore, under the main contract the employer was entitled to impose liquidated damages in the sum of $3,040,000, which was calculated in accordance

with the terms of the main contract. However, as a result of a compromise reached with the employer, only a sum of $2,308,700 was imposed as liquidated damages and was paid by the defendants. The payment was made in this way: the amount of $2,308,700 was the total amount of additional preliminaries claimed by the defendants and the amount of $3,040,000 was the total amount of liquidated damages claimed by the employer in the final account, and the sum of $2,308,700 was accepted by the employer as a set-off against the entire sum of $3,040,000. In support, the defendants relied on the affidavit of Cheah Sin Hean affirmed on 28 September 1979. The amount of liquidated damages so paid was for the delay occasioned in completing Phases I and II of the development, and the plaintiffs contribute to the delay and consequently were liable to indemnify the defendants against the liquidated damages imposed and other loss and expense incurred by the defendants.

Lau See Kiat further alleged in the affidavit that in addition to the payment of liquidated damages, the defendants' suffered further losses in that the delay in the development resulted in loss and expenses being incurred by the defendants. Such loss he computed at $535,600 based on a formula of his own. He then added this amount to the additional preliminaries of $2,308,700 and alleged that the delay in completing the building development had caused the defendants "to suffer losses totalling about $2,839,100". He went on to allege that the plaintiffs had contributed to this delay and therefore was responsible for payment of the losses sustained by the defendants. In respect of the plaintiffs' contribution to the delay in the completion of Phase I he concluded as follows:

> ...it is clear that the plaintiffs had contributed to the delay in the completion and handing over of Phase I (Podium Block) of the development and which rendered the defendants liable for liquidated damages. The extent of delay is assessed to be 2 months (60 days). On that basis, liquidated damages suffered were S$l,200,000 (60 days x $20,000/day). Loss and expense are estimated at $312,000-00 (60 days x $5,200/day).

He then went on to say that the plaintiffs also contributed to or were responsible for a period of the delay for the completion of Phase II of the development and he concluded as follows:

> In the premises, the defendants will contend that the plaintiffs are responsible for at least 60 days of the 102 days delay in completion of Phase II of the development. On that basis, the defendants will seek an indemnity amounting to S$600,000 (60 x S$l0,000 per day) in respect of liquidated and ascertained damages imposed by the employer against the defendants. Further, the defendants will counterclaim at least S$3l2,000 (60 x S$5,200 per day) being loss and expenses incurred by the defendants as a result of the delay.

The defence that the defendants were liable to pay and did pay an amount of liquidated damages and that the plaintiffs were liable to indemnify the defendants in respect of such payment was raised in the earlier application for a stay and was disposed of in the first appeal. The claim for additional loss in respect of delay alleged to have been caused by the plaintiffs in effect was the same loss but presented in a different way. On the basis of the defendants' own argument, if the defendants did not have to pay for any part of the liquidated damages, which they said they did pay, that is, the amount of $2,308,700, they would have received that amount from the employer and therefore would not have suffered the loss. As they did not receive this amount they suffered that amount of loss and therefore sought to claim contribution or indemnity from the plaintiffs in respect of such loss.

In my judgment, this issue was raised in the first appeal, though not in such a detailed manner, and was disposed of. The determination of such issue between the parties gave rise to issue estoppel. In my opinion, the defendants were therefore estopped from raising this same defence in resisting the application for summary judgment.

I need to refer only to two authorities. The first is *Fidelitas Shipping Co. Ltd. v. V/O Expotrchleb* [1966] 1 QB 630. There, the loading of a ship under charter was delayed for 3 weeks and on arrival at the destination the cargo was released to the consignees and only part of demurrage claim was paid. The claim for the balance of the demurrage was referred to arbitration. One of the issues before the arbitrator was whether by reason of certain provision called the "cesser clause" the owners of the ship ought to have recovered the demurrage by insisting on the lien and not having done so could not recover against the charterers. The umpire stated his award in a special case holding that the claim for demurrage was not excluded by the "cesser clause". Megaw J held that the claim for demurrage was excluded by the "cesser clause" and his decision was affirmed by the Court of Appeal. The award went back to the umpire and the owners then raised the point that the "cesser clause" had been waived and the charterers argued that the owners ought not to be allowed to raise it. The Court of Appeal held it was a case of issue estoppel and the owner was estopped from raising that point. Lord Denning MR (with whom Danckwert LJ agreed) said, at p. 640:

> The umpire held in his interim award (subject to the opinion of the Court) that the claim was not excluded. The Court took a different view and held that the claim was excluded by the cesser clause. That issue having been decided by the Court, can it be reopened before the umpire? I think not. It is a case of "issue estoppel" as distinct from "cause of action estoppel" and "fact estoppel,", a distinction which was well explained by Diplock LJ in *Thoday v. Thoday* [1964] p. 181. The law, as I understand it, is this: if one party brings an action against another for a particular cause and judgment is given upon it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. *Transit in rem judicatam*: see *King v. Hoare* [1844] 13 M & W 494, 504. But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances, see *Badar Bee v. Habib Noordin* [1909] AC 615, per Lord Macnaghten. And within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings. But this again is not an inflexible rule. It can be departed from in special circumstances.

Diplock LJ, the other member of the Court, said, at p. 642:

> In the case of litigation the fact that a suit may involve a number of different issues is recognised by the Rules of the Supreme Court which contain provisions enabling one or more questions (whether of fact or law) in an action to be tried before others. Where the issue separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment and, where appropriate, an application to the appellate Court to adduce further evidence: but such application will only be granted if the appellate Court is satisfied that the fresh evidence sought to be adduced could not have been available at the original hearing of the issue even if the party seeking to adduce it had exercised due diligence. This is but an example of a specific application of the general rule of public policy, *nemo debet bis vexari pro una et eadem causa*. The determination of the issue between the parties gives rise

> to what I ventured to call in *Thoday v. Thoday* an 'issue estoppel'. It operates in subsequent suits between the same parties in which the same issue arises. A *fortiori* it operates in any subsequent proceedings in the same suit in which the issue has been determined.

The second case is *Mills v. Cooper* [1967] 2 QB 459. That was a criminal case. Information was preferred against the defendant that he being a gypsy without lawful excuse or authority camped on a highway contrary to the provisions of the Highways Act, 1959. That charge was dismissed on the grounds that the justices were not satisfied he was gypsy. Some ten weeks later a similar information was preferred against him alleging he was a gypsy. The justices were in doubt whether the doctrine of issue estoppel applied but nonetheless dismissed it on the ground that the proceedings were oppressive and an abuse of the process of the Court. The prosecutor appealed and the Divisional Court allowed the appeal and held that the justices were right in not applying the issue estoppel but they were not entitled to hold that in the circumstances the proceedings were oppressive. Diplock LJ restated the principle thus, at p. 468-469:

> The doctrine of issue estoppel in civil proceedings is of fairly recent and sporadic development, though none the worse for that. Although *Hoystead v. Taxation Commissioner* [1926] AC 155 did not purport to break new ground, it can be regarded as the starting point of the modern common law doctrine, the application of which to different kinds of civil actions is currently being worked out in the Courts. That doctrine, so far as it affects civil proceedings, may be stated thus: a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a Court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him.

In my judgment, the doctrine of issue estoppel applies in this case. The defence of cross-claim against the plaintiffs was raised in the earlier application and was determined in the first appeal. The affidavits affirmed by Lau See Kiat in resisting the application for summary judgment contained a regurgitation in an amplified form of what he said earlier in his affidavits filed in support of the application for a stay. The defendants also relied on his earlier affidavits filed in that application for a stay. No doubt, much more material had since been produced. However, all these matters he now alleged could have been brought out in the application for a stay where he sought to show that there was a dispute in relation to the claim by the plaintiffs. So also could the affidavit of Cheah Sin Hean be filed in that application. No explanation had been given why all these matters could not, with the exercise of reasonable diligence, have been raised earlier.

I now turn to the second issue: whether, on the assumption that issue estoppel does not arise here, the defendants really have raised a triable issue in their defence to the claim of the plaintiffs. I revert once again to an examination of the matters deposed to in the multiple affidavits filed by both parties. As I have said earlier, the parties relied not only on the affidavits filed in the application for summary judgment but also on the affidavits filed in the earlier application for a stay.

There was no dispute that the total amount to which the plaintiffs were entitled under the sub-contract for work carried out and material and equipment supplied was $3,970,810.35; this was confirmed, first, by the statement of final account of the engineers agreed to by the

plaintiffs on or about 27 October 1986 and, secondly, by the letter of the architects dated 17 June 1987. Nor was there any dispute that of this total amount, a sum of $2,645,374.80 had been paid to the plaintiffs by the defendants, leaving a balance of $1,325,435.55 and this balance was the total of the amounts comprised or included in the certificates nos. 38 to 45 issued by the architects to the defendants. It was not disputed that the employer was strapped for cash and did not make any payment to the defendants of any amount due under these 8 certificates and that no payment was made by the defendants to the plaintiffs in respect of any of the amounts due to the latter under these certificates. Putting it graphically, when the employer stopped payment to the defendants, the defendants stopped payments too to the plaintiffs (and presumably to the other subcontractors).

As between the employer and the defendants, no request was made by either of them for the appointment of an arbitrator at any time prior to the issue of the final certificate and no such request was made by the defendants within 14 days after the issue thereof. Hence, under cl. 30(7) of the conditions of the main contract the final certificate was "conclusive evidence in any proceedings" that the works under the main contract (which included works under all the nominated sub-contracts) had been properly carried out and completed in accordance with the terms of the main contract (subject to certain exceptions, none of which, however, apply in this case.)

Prior to the commencement of this action by the plaintiffs, the defendants had already initiated proceedings in suit no. 2548 of 1987 against the employer claiming a total sum of $7,786,290.59 representing the total of all the amounts comprised in the 8 certificates issued to them by the architects. In their statement of claim dated 23 December 1987 the defendants averred (i) by para. 4:

> On various occasions, the architects issued Interim Certificates Nos. 38 to 44 certifying that a total sum of S$6,908,273.33 was due and owing by the defendants to the plaintiffs, particulars of which are as follows.

and (ii) by paras. 6 to 8:

> (6) On or about 18 June 1987, the architects further issued a Final Certificate certifying that a sum of S$878,0l7.26 including the retention sum of S$642,322.42 was due and owing by the defendants to the plaintiffs.
>
> (7) No request was made by either party to concur in the appointment of an arbitrator under the Contract before the issuance of the Final Certificate and the plaintiffs did not make any such request within fourteen (14) days after the issuance of the Final Certificate.
>
> (8) By reason of para. 6 hereof, the Final Certificate issued by the architects is conclusive evidence that the works have been properly carried out and, completed by the plaintiffs in accordance with the terms of the contract and that any necessary effect has been given to all the terms of the contract which required an adjustment to be made to the contract sum.

There was thus an unqualified stand taken by the defendants that the works under the main contract, which, of course, included the works under all the nominated sub-contracts, had been properly carried out and completed in accordance with the terms of the main contract.

The defendants in suit no. 2548 of 1987 took out an application for summary judgment and relied on the 8 certificates issued by the architects. In resisting the application the employer through its director, Cheah Sin Hean, raised the defence that the main contract had been discharged and substituted by the fresh agreement alleged to have been made between the employer and the defendants whereby the latter agreed to take properties from the employer

in satisfaction of their claim. In his affidavit affirmed on 16 October 1987 Cheah Sin Hean referred to the fact that in settling the final account the representatives of the employer and the defendants had several meetings and in para. 6 of his affidavit said:

> At these meetings, the defendants (that is the employer) explained that they were strapped for cash and requested that the plaintiffs (that is, the main contractors) consider foregoing their right to cash payment and to take, in lieu thereof, properties in the said payment. To induce the plaintiffs to accept this offer, the defendants indicated that they would drop their claim to liquidated damages and not dispute the accounts in the event the plaintiffs accepted the offer to take properties in lieu of cash.

He further said that this proposal was followed by the employer's letter dated 24 November 1986 (which I have earlier set out verbatim) to the defendants which "constituted a formal offer" to the defendants, and that after further exchange of letters a binding agreement was made between them. Cheah Sin Hean further said that various agreements were also made with nominated subcontractors, including the plaintiffs, whereby they would take properties from the employer in settlement of the amounts due to them. It is significant that the defendants' senior administrative manager, Yoji Kobayashi, in his affidavit in reply said in para. 30:

> The defendants (that is, the employer) would not suffer any detriment as alleged as there is no way that any of the sub-contractors concerned can enforce the alleged binding arrangement. When the plaintiffs (that is, the main contractors) are paid by the defendants, all the sub-contractors would subsequently be paid by the plaintiffs and their claims against the defendants, if any, would merge.

Admittedly, that was said in the context of his rebuttal to the points raised by Cheah on behalf of the employer. Nonetheless, it is a relevant admission of the stand the defendants took at that time. Eventually in that suit the employer consented to judgment in the sum of $7,786,290.59 being entered against it and that was the amount claimed.

On a close examination of the relevant documents before me the sum of $1,325,435.55 was and is due from the defendants to the plaintiffs, and the only question is whether the defendants have a cross-claim against the plaintiffs as alleged. That is the question to which I now turn.

Basically, the cross-claim of the defendants was put in two ways. In the first place, they alleged that the employer had imposed liquidated damages under the main contract for the delay in completing Phase I and Phase II of the development, and they relied on the telex of the architects dated 10 November 1986 as a certificate under cl. 22 of the main contract and on that certificate they said that the employer was entitled to claim liquidated damages in the sum of $3,040,000. They also relied on the statement of the final account forwarded to them by the quantity surveyors, W.T. Partnership, on 4 December 1986 which showed, among other things, this amount of liquidated damages and the defendants' claim for additional preliminaries amounting to $2,308,700. They further said that they had negotiations with the employer and, as a result, they came to a compromise whereby the sum of $2,308,700 for additional preliminaries was set off against the entire amount of $3,040,000 for liquidated damages. Therefore, the defendants had paid a sum of $2,308,700 as liquidated damages and they maintained that the plaintiffs had substantially caused or contributed to the delay and were liable to indemnify them against such payment.

Now, in raising this point defendants produced a new piece of evidence in the form of an affidavit affirmed by Cheah Sin Hean on 28 September 1989. Cheah, in his affidavit, by para. 8, said:

> The parties (that is, the defendants and the employer) then agreed that the said liquidated and ascertained damages of $3,020,000 payable by the defendants would be entirely set off against the said additional preliminaries of $2,308,700 due to the defendants. The agreement was made in consideration of the defendants' agreeing to accept properties in lieu of cash payment by the developers.

However, some 3 years ago in an open letter dated 24 November 1986 he said in no uncertain terms that: (i) the employer agreed to accept the final contract sum of $38,751,076.33 determined by W.T. Partnership - that sum was only marginally less than the final contract sum of $38,799,687.76 - if the defendants would accept "properties in Riverwalk Galleria" in exchange for the outstanding amount owing to the defendants, and (ii) should the defendants agreed "to the exchange of properties" no liquidated damages would be sought. There was no suggestion expressly or impliedly that the sum of $2,308,700 as additional preliminaries would be applied in setting off the entire amount of $3,040,000 as liquidated damages. His statement in that affidavit was also inconsistent with what he said in his affidavit affirmed on 16 October 1987 (to which I have adverted in some detail) in resisting the application by the defendants for summary judgment against the employer in suit no. 2548 of 1987.

Apart from the telex of the architects dated 24 November 1986 (which I have set out verbatim), there was no certificate issued by the architects under cl. 22 of the conditions of the main contract; that condition conferred a right to the employer to impose liquidated damages and was as follows:

> If the contractor fails to complete the works by the date of completion stated in the appendix to these conditions or within any extended time fixed under cl. 23 or the cl. 32(1)(c) of these conditions and the architect certifies in writing that in his opinion the same ought reasonably so to have been completed, then the contractor shall pay or allow the employer a sum calculated at the rate stated in the said appendix as liquidated and ascertained damages for the period during which the works shall so remain or have remained incomplete, and the employer may deduct such sum from any monies due or to become due to the contractor under this contract.

Nor was there any letter or document from the employer claiming that it intended to impose liquidated damages under that condition and to deduct the same from any money due or to become due to the defendants. Nothing has really been produced by the defendants to show that the defendants were liable to pay liquidated damages in any amount to the employer and did pay liquidated damages to the employer.

Assuming that there was a cross-claim as alleged by the defendants there was no notice given to the plaintiffs that a part of the liquidated damages which they had paid would be passed on to the plaintiffs. Again, there was not a scrap of contemporaneous document to the effect that the defendants held the plaintiffs responsible for any part of the delay computed by the architects and therefore liable to bear any part of the liquidated damages. Indeed, the telex of the architects dated 20 November 1986 was never passed on to the plaintiffs at any time until after the commencement of this action. In all his affidavits, Lau See Kiat, the contract manager of the defendants, had never explained why the plaintiffs were not apprised of the contents of such a telex. Nor had he said that, at or about the time when the defendants agreed to accept a settlement of the outstanding sum by a transfer of the properties of the employer, the plaintiffs had been notified of the defendants' claim against them for an indemnity or contribution for payment of the liquidated damages. The only plausible explanation is that the defendants did not envisage that there would be any serious claim by the employer for liquidated damages and no claim had been made for payment of any part of the sum of $3,020,000. In my judgment, on the material before me, no payment of any liquidated damages has been made by the defendants to the employer.

I now come to the second way or form in which the defendants framed their cross-claim. There was a delay in the development and the delay had caused the defendants "to suffer losses totalling about $2,839,100", and that the delay was substantially caused or contributed to by the plaintiffs, and the latter would therefore be liable to bear a large part of such losses. This amount of $2,839,100 was arrived at, first, by taking the amount of $2,308,000 claimed by the defendants as additional preliminaries and; secondly, by topping it up with a sum of $530,400 calculated on a certain formula which, so far as I can see, is devoid of any rational basis.

Considering, for the moment, only the alleged amount of $2,308,000 as additional preliminaries, I can find no basis for it. Lau See Kiat in his affidavit of 11 October 1989 boldly said that this amount was "valued by the quantity surveyor as at 4 December 1986" and relied on the statement of final account emanating from such quantity surveyor. That statement of final account was in draft submitted to the defendants and the employer for consideration and clearly was not a valuation of the amount of additional preliminaries. Obviously, the amount of additional preliminaries was submitted by the defendants for preparation of the final account and that statement was meant for discussion purposes between the defendants and the employer. There was no evidence, contemporaneous or otherwise, of this claim having been submitted to the architects and considered and approved by them. In any event, in so far as this amount of $2,308,700 is concerned, it is the same amount of loss alleged by the defendants to have been suffered in paying the liquidated damages. The defendants alleged that this amount of additional preliminaries had been incurred by them which they were entitled to claim against the employer but which was applied in setting off the amount of liquidated damages. Both the cross-claims relate to the same amount and to the same loss. They are the obverse and reverse sides of the same coin.

As for the additional sum of $530,400, again, Lau See Kiat had not shown any basis. It was calculated on a formula adopting as a base the sum of $2,308,700. As I have said, I can see no rational basis for that formula and there was no explanation for adding this further sum to the additional preliminaries of $2,308,700 alleged to have been sustained as a result of the delay in completing the development.

Under cl. 40(a) of the sub-contract the plaintiffs were obliged to ensure completion of the works in accordance with the completion period or extended time approved under the provisions of the main contract. The clause further provided:

> If the sub-contractor fails to complete the sub-contract works or any section thereof within the period specified or any extended period as herein after provided, he shall pay to the contractor any loss or damage suffered or incurred by the contractor and caused by the failure of the sub-contractor as aforesaid of which loss or damage the contractor shall, at the earliest opportunity give reasonable notice to the sub-contractor that the same is being or has been suffered or incurred.

No such notice has been given by the defendants to the plaintiffs of any loss or damage now alleged to have been suffered or incurred by the defendants.

There is one other piece of contemporaneous document which tends to show that there was really no question of any claim by the defendants against the plaintiffs for or in respect of the subcontract works undertaken by the latter. The plaintiffs were one of the nominated sub-contractors who agreed to accept properties from the employer in settlement of their outstanding sums owing for works carried out and materials and equipment supplied by them under their respective subcontracts. The agreement expressed to be made between the employer, the defendants and the plaintiffs had been prepared and was executed by both

the defendants and the plaintiffs but was not executed by the employer. In that agreement 3 units of "Riverwalk Galleria" were expressed to be transferred to the plaintiffs and the total agreed valuation of these units was $1,450,000, which exceeded the amount claimed by the plaintiffs, and the excess was intended to pay for additional work to be carried out by the plaintiffs. This was confirmed by Cheah Sin Hean in his affidavit affirmed on 16 October 1987 and filed in resisting the application by the defendants for summary judgment against the employer. In para. 16, Cheah said:

> In the case of Kian Gwan Engineering Pte. Ltd., the value of the properties involved in the agreement was $1,450,000 while the amount of the outstanding due was $1,325,443.55. It was agreed that the difference in value would be made up by Kian Gwan Engineering Pte. Ltd. carrying out additional works for the defendants.

Finally, the defendants said that they had a small claim of $10,419 for expenses incurred by them "as a result of the plaintiffs' failure to rectify the sub-contract works". I can see no basis for this claim. Again, this amount was not raised in the first appeal. The first time the defendants raised this claim was in Lau See Kiat's affidavit of 11 October 1989. To use an expression in common parlance, the defendants were really scraping the bottom in search for a defence.

In conclusion, on a close examination of all the affidavits filed and the exhibits produced I came to the inescapable conclusion that the defendants have no defence to the claim and the real reason for the defendants' refusal or omission to pay to the plaintiffs the balance sum of $1,325,435.55 is that the defendants have not received any payment from the employer, which is now in liquidation. All the defences raised are a sham and were raised for the purpose of delaying payment.

Also found at [1991] 3 CLJ 2301